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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 642

THE CINCINNATI GAS & ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, THE OHIO FUEL GAS COMPANY, THE DAYTON POWER AND LIGHT COMPANY, and THE CITY OF LANCASTER, OHIO,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit

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To the United States Court of Appeals for the District of Columbia Circuit

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, The Cincinnati Gas & Electric Company, prays that a writ of certiorari issue to review the Judgment of the Court of Appeals for the District of Columbia Circuit affirming an order of the Federal Power Commission.

OPINIONS BELOW

The Opinion and Order of the Federal Power Commission (R. 1123) is reported as *The Ohio Fuel Gas Company,* 15 F. P. C. 1623; 14 P. U. R. (3d) 266. Its Findings and

Order Denying Applications for Rehearing, etc. is at R. 1161. The opinion of the Court of Appeals (R. 1224) is reported as *The Cincinnati Gas & Electric Company* v. *F. P. C.*, 247 F. (2d) 556, and merely states that the Petition for Review was dismissed for the reasons set forth in the opinion in *The Cincinnati Gas & Electric Company, et al.* v. *F. P. C.*, 246 F. (2d) 688. The pertinent parts of the Commission orders and the opinions of the Court of Appeals are appended to this Petition.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered June 20, 1957 (R. 1226). Petition for Rehearing was seasonably filed by Petitioner and was denied on September 9, 1957 (R. 1231). The jurisdiction of this Court is invoked under 15 U. S. C. Sec. 717r(b) and 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals can, by deciding under Section 19(b) of the Natural Gas Act, that Petitioner is not aggrieved by an Order of the Federal Power Commission, avoid consideration of Petitioner's claim that the Commission did not comply with the Administrative Procedure Act and procedural due process?

2. Whether the Court of Appeals is in error (a) in deciding that Petitioner was not aggrieved by the Commission's order in respect of (i), (ii) or (iii) below and (b) in failing to decide that

> (i) The Commission's Order unlawfully seeks to assure to one of Petitioner's natural gas suppliers minimum demand revenues from Petitioner over a long term even though the gas requirements of Petitioner might substantially decrease due to loss of business to competitive fuels and technologies, in violation of

Sec. 4 (and 5) of the Natural Gas Act and substantive due process,

(ii) The Commission's Order unlawfully approves the imposition by Petitioner's said supplier of the long term billing commitment for minimum demand revenues, contrary to the existing Gas Service Agreement between Petitioner and Supplier and without the necessary consent of Petitioner or finding that said Agreement adversely affects the public interest under the Natural Gas Act, and/or

(iii) The Commission's Order unlawfully approves the extension of the long term commitment for demand revenues to the revenues and assets of the electric operations of Petitioner contrary to Section 4 (and 5) of the Natural Gas Act and substantive due process.

STATUTES INVOLVED

Sec. 4 of the Natural Gas Act (15 U. S. C. Sec. 717c), the principal section involved reads in part as follows:

> "Sec. 4. (a) All rates and charges made, demanded or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

The requirement of Sec. 5 of said Act that rates shall be "just and reasonable" is comparable.

Sec. 19(b) of the Natural Gas Act (15 U. S. C. Sec. 717r[b]), insofar as pertinent, reads as follows:

> "(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application

for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . ."

Sec. 8(b) of the Administrative Procedure Act (5 U. S. C. Sec. 1007[b]), insofar as pertinent, reads as follows:

"(b) Prior to each . . . decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions . . . of subordinate officers . . . and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions . . . shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Section 10 of the Administrative Procedure Act (5 U. S. C. 1009), insofar as pertinent, reads as follows:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion——

(a) *Right of Review.* Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and venue of proceedings.* The form of proceedings for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute. . . .

(c) *Acts reviewable.* Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. . . .

(e) *Scope of Review.* So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; . . . In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

The Fifth Amendment to the Constitution reads in part:

". . . nor shall any person . . . be deprived of . . . property, without due process of law. . . ."

STATEMENT OF CASE

This case involves the affirmance by the Court of Appeals for the District of Columbia Circuit of an order issued by the Federal Power Commission (the "Commission") on June 29, 1956, approving, among other things, the long term billing commitment feature of the Contract Demand rate form proposed by Ohio Fuel Gas Company ("Ohio Fuel") in a filing under the Natural Gas Act. The jurisdiction of that Court was invoked under Section 19(b) of the Natural Gas Act and errors were asserted as to the failure of the

Commission to comply with Sec. 8(b) of the Administrative Procedure Act and procedural due process, as well as to certain substantive matters.

Petitioner is a gas distributor and serves the area in and around Cincinnati, Ohio. It also distributes electricity in its service area. Ohio Fuel, an intervenor-respondent below, is a subsidiary of the Columbia Gas System, Inc., and makes interstate sales to a number of companies in Ohio, including Petitioner, subject to the jurisdiction of the Commission.

On September 18, 1953, Ohio Fuel filed a new Gas Tariff with the Commission through resort to the notice procedure of Sec. 4 of the Act (R. 573). This rate filing, in addition to increasing the level of the rates theretofore being charged, proposed the Contract Demand "rate form," involving the substitution of a long term (usually twenty years) commitment to pay demand charges for the one year commitment under the prior rate form and Gas Service Agreement.

"Rate form" refers to the tariff formula by which a customer's monthly bill is determined. Both the Contract Demand and prior rate forms provide for a demand charge and a commodity charge, the demand charge being generally designed to compensate for the capacity available during the billing period and the commodity charge being generally designed to compensate for the use of quantities of gas during the billing period. Demand and commodity rates are applied to the demand and commodity usages of a customer, called billing units. Thus, a monthly bill is arrived at in the following way:

Demand rate (×) billing demand units	= demand charge
Commodity rate (×) commodity billing units	= commodity charge
TOTAL BILL	= Sum of demand and commodity charges

The purpose of the demand formula, the commodity not being in issue, is generally to enable the seller to recover some portion of its fixed or capacity costs, regardless of the daily use. It is especially effective where large seasonal space heating loads are involved.

Under the Contract Demand "rate form" the billing demand units are equal to the greatest single day delivery during the twelve months ending with the billing month, but may not be less than 90% of the Contract Demand or greater than the Contract Demand. From time to time the Contract Demand can be changed with the agreement of both parties; but it cannot be reduced by the Purchaser alone except within fairly narrow limits, i.e., up to two 5% reductions in successive years or a total of 10% through the life of the Service Agreement. The rate form is implemented by requiring purchasers such as Petitioner to enter into long term Service Agreements in lieu of the existing Agreements specifying the Contract Demand.

In the hearings and proceedings before the Commission, Petitioner recommended (R. 1067 et seq.; 1150 et seq.) that the long term commitment feature be deleted, advancing contentions that the risk of loss of markets were ones which Ohio Fuel should bear under *Market St. Railway Co.* v. *R. R. Comm. of Cal.*, 324 U. S. 548. This point is based on the proposition that the business of supplying heat is a competitive one (R. 224-31, 251-55, Ex. No. 45) and that the Commission ought not to approve a rate form which would help perpetuate the existence of an enterprise that might turn out to be uneconomic.

Petitioner also urged (R. 1153 et seq.) that its existing Gas Service Agreement with Ohio Fuel was such that Ohio Fuel could not unilaterally change the length of commitment as to billing demand units absent Petitioner's consent or a finding of adverse affect on the public interest, as required by *United Gas Pipeline Co.* v. *Mobile Gas Service*

Corp., 350 U. S. 332 and *Sierra Pacific Power Co.* v. *F. P. C.*, 350 U. S. 348. The existing Gas Service Agreement is a limited requirements agreement covering a supply to Petitioner through April, 1965 (See Item No. GGG, R. 971, 949). Thus, the commitment for supply is a long term one. In contrast, the commitment as to rate schedules, *excepting*, in our opinion, *the General Terms and Conditions*, is for a short term.* That section reads as follows:

> "*Section 5. Applicable Rate Schedules.* Natural gas delivered hereunder shall be paid for under Rate Schedule F-1 or any superseding Rate Schedules of Seller included in the Tariff on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of the General Terms and Conditions included in the Tariff on file with the Federal Power Commission which are by reference made a part hereof."

However, Ohio Fuel resorted to Sec. 4 of the Act to change the rate and rate form. In that connection, Petitioner has contended that the provisions for long term commitment as to supply and short term commitment as to rates, do not permit Ohio Fuel to substitute a rate form embodying a long term commitment as to rates as well. Petitioner has also contended that Section 5 of the Agreement fixes the agreed on General Terms and Conditions as the *particular ones* attached to rate schedule F-1 on file with the Commission at the time and not subject to unilateral change through the life of the Agreement. Of course, these do not include a long term *billing* commitment. Significantly, there is no provision for unilateral supersession of the General Terms and Conditions, as in the case of the Rate Schedule because, as Petitioner has contended, they included such important and mutually

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* Although *Memphis Light, Gas and Water Division, et al.* v. *Federal Power Commission, et al.*, U. S. Court of Appeals for the District of Columbia Circuit, No. 13,666, decided November 21, 1957, is to the contrary.

binding provisions as the right to require the seller to meet competitive prices, and arrangements as to supply (R. 963). Nevertheless, Ohio Fuel unilaterally proposed the long term billing commitment through a change in the General Terms and Conditions (R. 595).

Petitioner's third contention was that, if the long term commitment was approved, a provision (R. 1065, 1148) should be included in the Tariff whereby the corporate commitment under the Contract Demand type Service Agreement would not extend to the revenues and assets of Petitioner's electric operations, which had not given rise to the commitment.

Petitioner's fourth contention was that it had not received an answer to its contentions as required under the Administrative Procedure Act (R. 1149).

The Commission issued its Finding and Order on June 29, 1956 (R. 1123) approving the Contract Demand rate form substantially as proposed. It thereby reversed its prior disapproval of that rate form for the same Ohio Fuel Gas Company in its Opinion No. 273.

Upon denial of its application for rehearing (R. 1147, 1161), Petitioner filed a petition for review in the Court of Appeals for the District of Columbia Circuit (R. 1215), making the contentions described above. The Court held that Petitioner was not aggrieved, under Sec. 19(b) of the Natural Gas Act, for reasons set forth in the companion decision described under "Opinions Below." The Court did not discuss the contentions based on the Administrative Procedure Act and procedural due process.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Cannot, by Deciding Under Sec. 19(b) of the Natural Gas Act that Petitioner Is Not Aggrieved by the Order of the Commission, Avoid Consideration of Petitioner's Claim that the Commission Did Not Comply with the Administrative Procedure Act and Procedural Due Process.

As a predicate to consideration of the avoidance of the procedural issues by the Court of Appeals, we shall discuss the way in which the Commission failed to answer two contentions made by Petitioner.

i. The Commission Did Not Answer Petitioner's Contentions on Market Street Railway and Mobile and Sierra Pacific.

The Commission's Order overruling the Applications for Rehearing (R. 1161) reads:

> "We have considered the other contentions raised by the applications for rehearing, including Cincinnati's objection to the long-term billing commitment of the CD rate form (*Market Street Railway, supra*—our note), the effect of the *Mobile* and *Sierra Pacific* decisions. . . . We find that they are not sufficiently material to warrant further discussion here, or that they have been fully considered and correctly disposed of in our order issued June 29, 1956, in this proceeding."

Surely, issues presented under *Market Street Railway* and *Mobile* and *Sierra Pacific, supra,* are material ones (see point 2 below) requiring discussion and ruling under the Administrative Procedure Act and due process.

The Commission's assertion that the objection to the long term commitment had already been considered and disposed of is based on footnote 4 in the Findings and Order issued June 29, 1956, reading:

> "A CD rate with a short-term commitment, such as a one-year contract, would not provide long-term stability in demand revenues" (R. 1130).

We submit that this statement displays no consideration of the competing principle of *Market Street Railway, supra,* that due process does not "insure values."

As to disposition of *Mobile* and *Sierra Pacific, supra,* Petitioner did not directly raise this contention until its Application for Rehearing, so that the Commission must have been referring to its disposition of Dayton Power and Light Company's contention based on those cases in the Findings and Order issued June 29, 1956, as follows:

> "As we show below, continued billing by Ohio Fuel under the average demand basis heretofore used is no longer in the public interest" (R. 1127).

Petitioner has no quarrel with the Commission's finding that the *short term aspects* of the prior rate form were inappropriate. However, the length of the billing commitment could not be unilaterally changed from 12 months to twenty years. The necessary finding that Petitioner's existing Service Agreement was in that respect contrary to the public interest was not made; indeed, Petitioner's Service Agreement was not even discussed.

ii. THE COURT OF APPEALS IS IN ERROR IN NOT CONSIDERING THE CONTENTION THAT THE ADMINISTRATIVE PROCEDURE ACT AND DUE PROCESS WERE NOT COMPLIED WITH.

Accordingly, Petitioner asserted before the Court of Appeals that it had not received an answer to either of the contentions discussed in i. above, as required by Sec. 8(b) of the Administrative Procedure Act:

> ". . . The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions . . . shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record. . . ."

Petitioner also asserted that it had not received procedural due process, namely, "the product of the Commission's expert judgment" as required by *Federal Power Commission* v. *Hope Natural Gas Company* (1943), 320 U. S. 591.

Nevertheless, the Court of Appeals gave no consideration to either of these contentions. Its opinion (Appendix A hereto) holds that Petitioner is not "aggrieved" by the Commission Order, relying for reasoning on the decision in the companion case, which recites:

> "Their statutory right to review of this order depends upon whether the petitioners actually are aggrieved by the portion of it they desire us to modify, which is the only portion of which they complain. Section 19(b) of the Natural Gas Act, under which the petition for review was filed, provides that any party to a proceeding under the Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in this court . . . by seasonably filing a petition praying that the order of the Commission be modified or set aside in whole or in part" (Appendix B, p. 7a).

The Court then reviewed each of Petitioner's three substantive grounds of error and came to the conclusion that Petitioner was not aggrieved as to any of the three grounds. At no point did the Court even so much as refer to Petitioner's procedural contentions. In fact, the Court does not refer to any instance where the Commission discussed the *Market Street Railway, supra,* doctrine. It is true it did quote (Appendix B, p. 12a) the Commission's purported findings on *Mobile* and *Sierra Pacific, supra,* but, as we have discussed above, whatever the Commission's intention, the findings were inadequate.

The Court's decision was a clear departure from the way the case was presented by Petitioner, the Commission and the intervenor Ohio Fuel. For example, the Com-

mission had asserted in footnote 5 to its Order Denying Application for Rehearing (R. 1161-2) that the Administrative Procedure Act had been complied with. But assertion is not enough.

Because of this departure, Petitioner filed a Petition for Rehearing of the Court's decision specifically claiming error in that respect (R. 1227). That petition was denied without opinion (R. 1231). This represents, we submit, a clear holding that compliance with the "grievance" test of Sec. 19(b) was the only requirement.

The Court was no doubt led into error because the Petition was filed under Sec. 19(b). However, Sec. 10(b) of the Administrative Procedure Act requires that the Petition be so filed:

> "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute. . . ." (5 U. S. C. Sec. 1009)

This provision surely does not do away with the necessity for compliance with the rest of the Administrative Procedure Act. Thus, subsection (e) of Sec. 10 of that Act requires that the Court shall set aside agency action found to be ". . . (4) without observance of procedure required by law . . . and due account shall be taken of the rule of prejudicial error." The procedure which Petitioner claims was not observed is prescribed in Sec. 8(b) of that Act, namely the provisions requiring an answer to material issues and contentions.

That the Commission's failure to give an answer to, and hence evidence consideration of Petitioner's contentions, was prejudicial is graphically illustrated by the fact that the Commission had, in a prior proceeding, disapproved of the Contract Demand rate form. See Commission Opinion No. 273 (unreported). If Petitioner's contentions

had been considered in this proceeding, it is possible that they would have been held well taken.

iii. A Public Question Is Involved.

Thus, at both the commission and judicial levels, Petitioner has been unable to obtain the kind of consideration of its contentions that the law and due process require. Consideration of an issue is the very minimum to which a party is entitled in the administrative process. Though the result in this proceeding is a grievous wrong to Petitioner, the decision is more far reaching.

While the Natural Gas Act provides for hearing and review in general terms, the Administrative Procedure Act outlines the specific procedures required. The proceedings herein illustrate the special importance and meaning of these detailed provisions for the many litigants concerned with administrative procedure.

Through the years, the Court has shown great interest in the protection of the civil liberties of individuals from improper governmental encroachment. It is also of great importance that the administrative determinations of the government in the field of business be arrived at through fair procedures.

2. The Court of Appeals Was in Error (a) in Deciding that Petitioner Was Not Aggrieved by the Commission's Order and (b) in Failing to Decide that Petitioner's Three Substantive Claims Were Well Taken.

The Court of Appeals held that Petitioner was not aggrieved by the order because it found none of its contentions presently well taken. The consequences of that kind of a decision can be far reaching. If the Commission follows such a concept, it can deny intervention so long as it can be sure that the intervenor's contentions are not well taken. Surely such a procedure will not produce the best

administrative results, where the issues are not made up in advance as in civil practice.

Nevertheless, Petitioner urges that the Court erred in failing to remand with disapproval of the long term billing commitment. The involuntary entering upon a long term contractual obligation is in its view a truly onerous and present event in the light of the three concepts which we shall now outline.

i. "Market Street Railway" Requires Disapproval of the Long Term Commitment.

The Commission's approval of the long term billing commitment, affirmed by the Court of Appeals, appears to have resulted from application of its "prudent investment" philosophy of rate making, whereby a utility is entitled to earn on the cost of facilities originally prudently constructed and paid for. However, this Court in *Market Street Railway, supra,* held that the prudent investment theory is not properly used in regulating an industry a portion of whose value has been lost due to economic forces and that substantive due process does not "insure values" or "restore values that have been lost by operation of economic forces."

The Commission justified the long term commitment solely in these words:

> "A CD rate with a short-term commitment, such as a one-year contract, would not provide long-term stability in demand revenues." Findings and Order, footnote 4, R. 1130.

We submit that such a decision is erroneous because it takes no account of the competing principle of *Market Street Railway, supra.*

Petitioner further claims that approval of the long term commitment is unreasonable under the Natural Gas Act,

the primary aim of which is to "protect consumers against exploitation at the hands of natural gas companies" *F. P. C.* v. *Hope Natural Gas Co.* (1943), 320 U. S. 591 at 610.

The Court of Appeal's determination that Petitioner is

> "not presently aggrieved by the long term billing commitment of the contract demand component in the approved rate form, merely because drastic economic changes now unforeseeable might occur during the term" (Appendix B, p. 10a).

begs the question that Petitioner is presently required to enter into an agreement, involuntarily, to insure payment over the long term of the applicable portion of the cost of its supplier's facilities notwithstanding that the future vicissitudes of the business may diminish, or even eliminate, the value of the facilities.

The Court stated that in event the changed conditions occur, the Commission "would of course give immediate consideration to any future complaint of injury . . ." (Appendix B, p. 10a). If such consideration is to be given, how much more appropriate it is to take account of it at the outset, namely, by deleting the long term commitment so that the problem cannot arise. Certainly, regulation should not help perpetuate an industry against the day when it is beset by price and technological competition. Such a prospect, though in the future, becomes a present wrong through the required contractual commitment.

ii. The Gas Service Agreement Precludes a Long Term Billing Rate Commitment Under Mobile and Sierra Pacific.

The Court of Appeals stated (see Appendix B, p. 11a) in effect that, even if the Commission's decision had the effect of unilaterally changing Petitioner's existing Service Agreement with Ohio Fuel without the necessary finding

of adverse affect on the public interest, Petitioner was not aggrieved thereby. Such a construction enables the unilateral rewriting of contractual rights effective in the future simply because the future is not foretold. We know of no rule of contract law permitting this. We understand *Mobile* and *Sierra Pacific* to mean that a contract is a contract until the Commission makes the required finding.

In addition, the Court of Appeals asserted that the Service Agreement contemplates future filings and that therefore no unilateral change had been made.* This was not discussed in the Commission's opinion and is, we believe, dispelled by the contractual provisions quoted in the "Statement of Case." In brief, the Service Agreement provides that the rates originally in effect could be superseded but that the General Terms and Conditions were fixed for the term of the contract, unless the Commission should find an adverse affect on the public interest, etc. This is purely a matter of the interpretation of the Agreement; but it has wider importance because of the fact that many similar agreements have been executed by others due to the standardization of the form of Service Agreements instituted under the tariff conversion program of the Commission. See Commission Order No. 144, issued October 30, 1948.

The Court of Appeals also asserted that, even if the Service Agreement did not contemplate unilateral change of the short term rate commitment, the necessary finding as to adverse affect on the public interest had been made by the Commission. However, we believe we have shown under Point 1. above that the Commission did not consider this contention, let alone find that the existing Agreement had an adverse affect on the public interest. It is clear from *Sierra Pacific* that the finding must be directed against the existing contract:

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* Cf. The *Memphis* case, supra.

"But while it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself *agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain*" (350 U. S. 348, at p. 355). (Emphasis added.)

Indeed, no valid finding could be made against the short term commitment in view of *Market Street Railway Co., supra.*

iii. The Unlawful Extension of the Long Term Commitment to the Electric Business.

Petitioner carries on a substantial electric, as well as gas, business. Since the long term commitment for minimum demand revenues is to be entered into by it as a corporation, the commitment is a burden on the electric, as well as the gas, business. In the event of a loss of gas markets and consequent inability to pay the claims for the demand charges, the electric operation and its customers would have to subsidize the gas or risk the adversities of receivership and court house sale.

A fundamental rule of rate regulation is that each class of business is to bear only its share of the costs. The leading case in this field is *Colorado Interstate Gas Co.* v. *Federal Power Commission* (1944), 324 U. S. 581, where Mr. Justice Douglas stated at p. 588:

"The function which an allocation of costs (including return) is designed to perform in a rate case of this character is clear. The amount of gross revenue from each class of business is known. Some of those revenues are derived from sales at rates which the Commission has no power to fix. The other part of the gross revenues comes from the interstate wholesale

> rates which are under the Commission's jurisdiction. The problem is to allocate to each class of the business its fair share of the costs."

Petitioner's electric operations are in no way responsible for the requirements and costs of the gas business.

Accordingly, Petitioner proposed to the Commission that the commitment of the Gas Service Agreement be limited to the gas business, its revenues and assets (R. 1065).

The Commission held that such a provision would be contrary to the public interest, and then inconsistently indicated that should the rate form become unreasonable, "a remedy is open through appropriate procedure under the Natural Gas Act" (R. 1162).

The Court of Appeals held that Petitioner could "easily" remedy the situation by separately incorporating and committing its gas business and further that Petitioner was not in any event aggrieved until its gas business suffered the sickness of *Market Street Railway, supra.*

We submit, however, that it is not in the public interest to complicate financial structures where the defect can easily be remedied by a change in the Tariff. Again, the unduly burdensome corporate commitment furnishes the present basis for Commission action.

iv. A Public Question Is Involved.

It should be apparent from the foregoing that the decisions of the Commission and Court of Appeals adversely affect hundreds of gas distributing companies throughout the United States.

The Contract Demand rate form with attendant long term commitments are employed by many of the natural gas companies subject to the jurisdiction of the Commission. Since the natural gas is produced in the Southwest, West and Canada, most gas distributing companies pur-

chase under these tariffs. Such companies would be affected by the contention based on the *Market Street Railway* principle (i).

As to contention (ii) above, many distributing companies have executed gas service agreements similar to Petitioner's existing one, due to the Commission's tariff conversion program discussed above. Accordingly, a decision on Petitioner's Gas Service Agreement could well affect many others. For example of widespread use of this type of Service Agreement, see *Memphis Light, Gas and Water Division, et al.* v. *Federal Power Commission, et al.*, U. S. Court of Appeals for the District of Columbia Circuit, No. 13,666, decided November 21, 1957.

As to the third contention, namely (iii) above, many gas distributors also serve electricity and hence all such combination companies would have an interest in the limitation of liability to gas operations.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WALTER E. BECKJORD,
RICHARD H. RHEIN,
Attorneys for Petitioner.

November 29, 1957.

CERTIFICATE OF SERVICE

I, Walter E. Beckjord, one of the attorneys for The Cincinnati Gas & Electric Company, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of December, 1957, I served copies of the foregoing Petition for Writ of Certiorari on the several respondents thereto, by mailing a copy thereof, with air mail postage prepaid, to each of the following at the respective addresses shown:

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Counsel for Petitioner.

ACKNOWLEDGMENT OF SERVICE

We, the undersigned hereby acknowledge service upon each of us of a copy of the foregoing Petition for Writ of Certiorari, in our respective capacities and on the date entered below.

	Attorney for	*Date*
_____	_____	_____
	Attorney for	
_____	_____	_____
_____	_____	_____

Appendix "A"

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, CASE NO. 13557, decided June 20, 1957, 247 F. (2d) 557.

Before WILBUR K. MILLER, DANAHER and BASTIAN, Circuit Judges.

PER CURIAM.

Cincinnati Gas & Electric Company seeks review and modification of an order of the Federal Power Commission which permitted Ohio Fuel Gas Company, from which it purchases natural gas, to introduce into its demand-commodity rate structure a contract demand long-term billing commitment provision.

In *Cincinnati Gas & Electric Co.* v. *Federal Power Comm.*, 1957, 100 U. S. App. D. C. —, 246 F. (2d) 688, this petitioner and its subsidiary attacked a similar order issued with respect to their principal supplier, Central Kentucky Natural Gas Company, on the same grounds asserted here. We held they were not aggrieved by the order and, for that reason, dismissed their petition. This case, being in all respects identical with that one, is controlled by it.

Petition dismissed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Before WILBUR K. MILLER, DANAHER and BASTIAN, Circuit Judges.

JUDGMENT

(Filed June 20, 1957)

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel for petitioner and submitted on the brief by respondent.

Appendix "A"

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for review of the order of the Federal Power Commission in this case be, and it is hereby, dismissed for the reason stated in the opinion this day filed herein.

Date: June 20, 1957.

Per Curiam.

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, Case No. 13515, decided June 3, 1957, 246 F. (2d) 688.

Before WILBUR K. MILLER, DANAHER and BASTIAN, Circuit Judges.

WILBUR K. MILLER, Circuit Judge.

[1] Cincinnati Gas & Electric Company and its subsidiary, Union Light, Heat and Power Company,[1] are retail distributors of natural gas purchased at wholesale from Central Kentucky Natural Gas Company. They petition for review and modification of an order of the Federal Power Commission which permitted Central Kentucky and its affiliated supplier, United Fuel Gas Company, to change their demand-commodity rate form by providing for a contract demand over a long term. Under the new form, the billing demand is not to exceed, nor be less than 90 per cent of, a quantity of gas to be agreed upon by the seller and buyer as an estimate of the buyer's maximum-day requirement during the term of the contract between them —usually 20 years.[2] In the rate form previously in effect,

[1] They will be referred to collectively as Cincinnati-Union or as the petitioners.

[2] Other provisions of the Commission-approved proposal (a) imposed penalties on the buyer for unauthorized takes in excess of the agreed

the demand charge was based in general on actual maximum-day demand during the twelvemonth ending with the month of billing or on the average daily demand during the peak month of that period.

The order in question was entered in consolidated proceedings which originated when Central Kentucky and United Fuel filed with the Commission new tariffs providing for substantial increases in both demand and commodity charges, and for the long-term contract demand to which we have referred. At the request of Cincinnati-Union and another, the Commission ordered a hearing limited to the contract demand element of the proposed rate form, and reserved for future hearing and consideration all other issues concerning the new tariffs, including of course the proposed increases in the demand and commodity charges.

After a thorough hearing, in which Cincinnati-Union opposed the entire contract demand provision, the examiner filed a comprehensive opinion, and made detailed findings of fact upon the basis of which he approved the proposed contract demand form. The Commission conducted an *en banc* hearing on exceptions to the examiner's initial decision, following which it approved his action and filed an opinion setting forth at some length its reasons for doing so. We summarize those reasons by selecting language from the opinion without indicating occasional omissions of material in the interest of brevity:

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maximum, and on the seller for failure to deliver the maximum when required; (b) required the seller to increase the contract quantity on the buyer's request if supply and facilities permitted and, if not, to use due diligence to provide them; (c) permitted the buyer to reduce the maximum-day quantity by 10 per cent during the term of the contract in steps of five per cent in one year; and (d) permitted the seller and buyer further to reduce by agreement the maximum-day quantity if other use could be made of the seller's capacity thereby released.

Appendix "B"

"[T]he primary fact influencing our determination is the magnitude of growth of the space-heating load in the area served by the distribution customers of United Fuel and Central Kentucky. The record shows that not only has this space-heating load mushroomed in the past few years but also that the growth is continuing. The record shows that the design capacity of United Fuel and Central Kentucky is fully utilized only once in approximately every eight years. This capacity is installed on the basis of estimated peak demands of their customers which in turn base their peak estimates upon cold weather conditions occurring, on an average, once in eight years. These annual weather variations result in a 'feast or famine' recovery by United Fuel and Central Kentucky of costs collected through demand charges. The CD [contract demand] rate form will tend to stabilize recovery of these costs.

"The second element in the CD rate form, the length of the term of commitment, also plays a part in our decision. A one-year or other short-term contract would defeat the purposes of the CD rate forms, since it would not minimize the effect of the year-to-year fluctuations in the demand. It would neither stabilize earnings nor encourage use of peak shaving by customers. We do not feel that a commitment over the life of the contract is unreasonable, particularly when it is remembered that our scrutiny in the rate-making process is a continual one.

"The demand revenues accruing through the contracted billing demand charge will not assure United Fuel and Central Kentucky of all fixed costs incurred for the benefit of the customer companies. Obviously, the demand charge which finally results from the second stage of these proceedings will not reflect all fixed costs of United Fuel and Central Kentucky. Of course the rate level, as well as the amount of the demand charge, awaits our further determination."

Appendix "B"

In addition to adopting the findings of the examiner with respect to the matters discussed in its opinion,[3] the Commission made the following express finding:

> "Continued billing by United Fuel and Central Kentucky under rate forms previously prescribed does not give sufficient firmness to the demand charges nor provide for long-term commitments by the customers both of which are essential for continued financial stability of United Fuel and Central Kentucky; nor does such billing encourage use of peak shaving by the customers.

[3] We reproduce those findings of the examiner:

"(6) Long-term contracts for essential southwest gas and the facilities required (a) to meet annual requirements and (b) to have capacity available to meet the estimated maximum peak day have created for United Fuel and Central Kentucky rigid costs of tremendous magnitude.

"(7) The CD rate forms filed by United Fuel and Central Kentucky, as amended, seek to recoup through a minimum billing demand a portion of the costs incurred for having capacity available irrespective of the usage of capacity, and reliable evidence shows that such recoupment has become increasingly necessary as the space heating load has grown and demand revenues (without a CD floor under them) fluctuate more and more in unison with temperature variations.

"(8) The growth of the space heating load of the wholesale customers of United Fuel and Central Kentucky has intensified the necessity of recovering minimum demand revenues from their wholesale customers as provided in the proposed CD rate form as hereinafter further amended in paragraph (C).

"(9) The proposed rate forms as amended recognize the present characteristics of the natural gas industry.

"(10) The proposed CD rate forms as amended distribute demand costs between the wholesale customers of United Fuel and Central Kentucky, with appropriate leeway, in accordance with customer-responsibility therefor.

"(11) The proposed CD rate forms as amended are just and reasonable as between United Fuel and Central Kentucky and their customers and as between the customers themselves.

"(12) Based upon the informed judgment of competent witnesses reflected in the record, it is reasonable to conclude that the proposed CD rate forms as amended are just and reasonable since they are, among other things, based upon the financial and operating necessities of the gas business of United Fuel and Central Kentucky.

"(13) The filed CD . . . rate forms of United Fuel and Central Kentucky, together with the revisions of such rate forms, being just, reasonable, non-discriminatory and non-preferential, it is appropriate that they be approved as amended."

Therefore, further use of these rate forms would not be in the public interest."

As we have noted, the petitioners objected to the entire contract demand billing formula in the hearing before the examiner. But, as their objection was primarily to the long-term billing commitment feature, they tell us in their brief that before the Commission "they took exception to the long term billing commitment features and the extension of the commitment to the electric operations and in effect waived their objections to the Contract Demand rate form as to the short term." The petitioners say they favor a contract demand form "*so long* as the ratchet is effectively limited to a short term, such as twelve months, rather than twenty years."

Thus the petition for review is also limited in scope. Cincinnati-Union confine their attack to the long-term billing commitment feature of the contract demand. They say they are aggrieved by the Commission's order "insofar as it approved (a) the long term billing commitment feature of the contract demand rate form, and (b) the extension of that feature to the assets and revenues of your Petitioners' respective electric, as distinguished from gas, operations. . . ." They pray therefore that we modify the Commission's order to provide for

"(i) The elimination of the long term billing commitment feature of the contract demand 'rate form' by limiting the ratchet on the billing demand to a 12 month period, rather than extending it over the life of the Service Agreement;

"(ii) The limitation of the extent of the long term billing commitments with Central Kentucky to the natural gas revenues, plant and assets of your Petitioners, and excluding therefrom the other, including

electric revenues, plant and assets of your Petitioners."

Their statutory right to review of the order depends upon whether the petitioners actually are aggrieved by the portion of it they desire us to modify, which is the only portion of which they complain. Section 19(b) of the Natural Gas Act,[4] under which the petition for review was filed, provides that any party to a proceeding under the Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in this court or in any other appropriate court of appeals by seasonably filing a petition praying that the order of the Commission be modified or set aside in whole or in part.

It is therefore essential first to examine the allegations and arguments of the petitioners as to how they are aggrieved by the long-term billing commitment phase, to ascertain whether they have the standing to seek review upon which our jurisdiction depends. The petitioners particularize as to aggrievement due to the long-term billing commitment by making three allegations of injury which we shall discuss in separate numbered sections of this opinion.

1. They assert that the order unlawfully requires them to pay Central Kentucky minimum demand revenues over a long term, even though their gas requirements "might substantially decrease due to loss of business to competitive fuels and technologies." Although this is envisaged only as a possibility, the petitioners inconsistently say that "inevitably" the long-term commitment "will hasten the day of insolvency" for them, and is therefore unlawful under *Market Street R. Co.* v. *Railroad Comm. of State of*

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[4] 15 U. S. C. A. § 717r(b).

California, 1945, 324 U. S. 548, 65 S. Ct. 770, 89 L. Ed. 1171, and *Spiegel* v. *Public Utilities Comm.*, 1955, 96 U. S. App. D. C. 307, 226 F. (2d) 29. In the *Market Street* case, only constitutional issues were raised. The railway company contended the rate reduction order complained of deprived it of its property without due process of law, contrary to the Fourteenth Amendment.

The Supreme Court pointed out that the railway company was a "particularly ailing unit of a generally sick industry" [324 U. S. 548, 65 S. Ct. 774] whose property had been reduced in value by economic forces beyond the possibility of regulatory repair, and upheld the Commission in using as a rate base the sum of $7,950,000 at which the physical property had been offered to the City of San Francisco. It was sold to the city for $7,500,000. In such circumstances historical cost, reproduction cost and prudent investment are not to be considered, said the Court.

This holding would not have applied to the ordinary metropolitan street railway company at the turn of the century, when the industry was flourishing and traction stocks had gilt edges, on the mere possibility of a drastically depressing economic change such as occurred with the advent of the automobile. The *Market Street* holding has no application, as the opinion shows, to a dynamic industry which is in the midst of phenomenal growth. In the *Spiegel* case we directed a remand to the Public Utilities Commission because it had not given an adequate statement of its reasons for adopting the original cost rate base. The case is inapposite here.

The petitioners do not allege that the long-term billing commitment will have any immediate unfavorable impact upon them. They do not contend it will force them to contract for a greater demand than they would agree to under

a short term. In fact, they say the contrary. In discussing "a short term contract demand rate form," such as they propose, Cincinnati-Union state:

> "... The peak load varies from year to year, depending on the severity of the weather conditions. Accordingly, the peak load requirements are calculated on the basis of the most severe condition (referred to as the design peak day) that is likely to be encountered. A Contract Demand equal to that amount would be negotiated with Central Kentucky. . . ."

This means, of course, that in the absence of the long-term demand billing provision, Cincinnati-Union would nevertheless plan each year to meet the estimated demands of their customers at the lowest temperature which, on the average, may be expected to occur once in eight or ten years. This "design peak day" in the average year will be greater than the actual peak.

It is thus clear that Cincinnati-Union do not complain of any present injury from the long-term billing commitment provision. They rely upon the possibility that the natural gas business may become a sick industry, such as the street railway business was when the case of the *Market Street Railway* was before the Supreme Court. But the petitioners did not offer to show by expert opinion or otherwise that the natural gas industry faces such a fate in the foreseeable future. In fact, their own expert witness testified that he considers the gas business to be one of the more stable businesses of this country. They did not even allege that such a debacle is a probability, but were content to say it might happen. This is not enough. To adjust a rate form to the possibility that unanticipated disaster may come to a presently prosperous and stable industry is, we think, unjustifiable, particularly in view of the fact that the Fed-

eral Power Commission is empowered continuously to scrutinize the economic situation of companies subject to its regulation, with authority to act in the public interest at any time, and would of course give immediate consideration to any future complaint of injury through changed conditions. Cf. *Federal Power Comm.* v. *Hope Natural Gas Co.*, 1944, 320 U. S. 591, 615, 64 S. Ct. 281, 88 L. Ed. 333.

What Cincinnati-Union seek here is present relief from an undemonstrable future danger. Their economic forebodings should be allayed now, they say. We think they are not presently aggrieved by the long-term billing commitment of the contract demand component in the approved rate form, merely because drastic economic changes now unforeseeable might occur during the term.

2. A second specification of aggrievement due to the long-term billing commitment is the allegation that the order unlawfully approves its extension to the revenues and assets of the electric operations of the petitioners; that is to say, Cincinnati-Union complain that the Commission refused to exclude their electric assets and revenues from liability to their gas creditors. If Cincinnati-Union desire to place their electric departments beyond the reach of gas department creditors, they can easily do so by separately incorporating their electric and gas businesses, subject to the approval of local regulatory authorities having jurisdiction; that they have not done so is the result of their own choice.

But, even if the novel notion that they should be exempt from general corporate liability for gas debts incurred through the operation of the long-term billing commitment could be accepted, the Commission's refusal to grant such exemption does not presently aggrieve the petitioners. For

the electric revenues and assets will not be called upon by gas creditors unless and until the gas industry suffers the sickness of the Market Street Railway, a contingency too remote and speculative to be the basis of rejecting the long-term billing commitment, as seen in the preceding section of this opinion. The petitioners therefore are not presently aggrieved in this respect by the long-term billing commitment, nor will they be in the future, unless and until they are "hastened into insolvency" by its operation.

3. Another specification of aggrievement due to the long-term contract demand is the allegation that, in approving it, the order unlawfully changes the gas service agreements between Central Kentucky and Cincinnati-Union "without the necessary finding that said agreements adversely affect the public interest under the Natural Gas Act." Although under the view we take of the case it is unnecessary to do so, we stop to discuss the merits of this contention. The petitioners rely upon *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 1956, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373, and *Federal Power Comm.* v. *Sierra Pacific Power Co.*, 1956, 350 U. S. 348, 76 S. Ct. 368, 100 L. Ed. 388, which hold, respectively, that the Natural Gas Act and the Federal Power Act do not give natural gas companies and power companies the right by their own unilateral action to change rates established by contract.

These cases are readily distinguishable from this one, for here the service agreement expressly contemplates future filings and there has been no unilateral change in rates fixed by contract. But, had there been, the Commission had the power to change the rate form as it did, provided it made the necessary finding. The Supreme Court said in the *Sierra Power* case, 350 U. S. at page 353, 76 S. Ct. at page 371:

Appendix "B"

". . . The Commission has undoubted power under § 206(a) [5] to prescribe a change in contract rates whenever it determines such rates to be unlawful. While this power is limited to prescribing the rate 'to be thereafter observed' and thus can effect no change prior to the date of the order, the Commission's order here, if based on the necessary findings, could have been effective to prescribe the proposed rate as the rate to be in effect prospectively from the date of the order, June 17, 1954. If the proceedings here satisfied in substance the requirements of § 206(a), it would seem immaterial that the investigation was begun as one into the reasonableness of the proposed rate rather than the existing contract rate.

"The condition precedent to the Commission's exercise of its power under § 206(a) is a finding that the existing rate is 'unjust, unreasonable, unduly discriminatory or preferential. . . .' "

This condition precedent was met in the instant case. On the basis of the recitals in the Commission's express finding quoted earlier in this opinion, it concluded: "Therefore, further use of these rate forms [those previously prescribed] would not be in the public interest." It is immaterial, as the Supreme Court said, that the Commission began the investigation to inquire into the reasonableness of the contract demand which was to endure for the life of the contract, rather than the reasonableness of the previous rate form.

But even if the challenged portion of the order had prescribed the longer-term billing commitment contrary to the two Supreme Court cases, the jurisdictional question would remain: are the petitioners presently aggrieved thereby?

[5] Section 206(a) of the Federal Power Act, 16 U. S. C. A. § 824e(a), which is substantially identical with § 5(a) of the Natural Gas Act, 15 U. S. C. A. § 717d (a).

They do not say the order impinges on any constitutional right. It follows that, for the reasons given in the foregoing discussion, the only aggrievement therefrom is that which might occur if the presently prosperous natural gas industry should fall upon evil times, with the long-term billing commitment still in effect although the Federal Power Commission had been standing by. As we have seen, this remote possibility is not present aggrievement.

[2] We conclude that none of the petitioners' specifications as to how they are aggrieved by the portion of the order under attack is sufficient to give them the right to review under § 19(b) of the Act. This section means, we think, that a petitioner's aggrievement must be present and immediate, or at least must be demonstrably a looming unavoidable threat. It must be "immediately pressing," as the Supreme Court said in *Eccles* v. *Peoples Bank*, 1948, 333 U. S. 426, 432, 68 S. Ct. 641, 645, 92 L. Ed. 784, from which we quote:

> "Thus the Bank seeks a declaration of its rights *if* it should lose its independence, or *if* the Board of Governors should reverse its policy and seek to invoke the condition even though the Bank remains independent and *if* then the Directors of the Federal Deposit Insurance Corporation should not change their policy not to grant deposit insurance to the Bank as a non-member of the Federal Reserve System. The concurrence of these contingent events, necessary for injury to be realized, is too speculative to warrant anticipatory judicial determinations. Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing. Many of the same reasons are present which impel them to abstain from adjudicating constitutional claims against a statute before it effectively and presently impinges on such claims."